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Supreme Court, U.S.
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No. 01-1368

IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF ALABAMA, ALASKA, DELAWARE, FLORIDA, HAWAII, INDIANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND UTAH, AS *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment.

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The States of Alabama, Alaska, Delaware, Florida, Hawaii, Indiana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and Utah ("the *amici* States") respectfully submit this brief, as *amici curiae*, pursuant to Sup. Ct. R. 37.4. The *amici* States submit this brief in support of the petition for a writ of certiorari filed in this case by the Nevada Department of Human Resources, et al.

INTEREST OF *AMICI CURIAE*

State governments employ more than 4.8 million full- and part-time workers.[1] As some of the nation's largest employers, the States have a significant practical interest in federal employment laws and policies, particularly those that may expose State governments to liability for civil damages. As guardians of their citizens' public fisc, the States also have an interest in ensuring that any abrogation of their Eleventh Amendment immunity comports with the constitutional framework for such action. Because the decision of the Court of Appeals in this case departed from this Court's now well-established precedent for determining when Congress may properly abrogate the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment, the *amici* States have an interest in seeing the Ninth Circuit's error promptly corrected.

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[1] *See* Governments Div., U.S. Census Bureau, *Government Employment March 2000* 1 (2002), http://www.census.gov/govs/apes/00emppub.pdf. As its title suggests, figures cited from *Government Employment March 2000* are based on data collected for the month of March 2000.

SUMMARY OF ARGUMENT

The holding of the Court of Appeals for the Ninth Circuit in this case—that Congress validly abrogated the States' Eleventh Amendment immunity from suits under the "family leave" provision of the Family and Medical Leave Act of 1993—creates a conflict with the Fifth and Sixth Circuits and rejects the reasoning of six other circuits and a State supreme court. The Ninth Circuit erred because Congress was not attempting to remedy a pattern of unconstitutional State conduct by enacting the FMLA. Congress identified no such pattern of conduct. In fact, Congress specifically documented and highlighted the fact that most States were ahead of the Federal Government in addressing the family and medical leave needs of their employees. Congress cited the Equal Protection Clause of the Fourteenth Amendment as a justification for its own approach to leave issues, but it never accused the States of violating their obligations under the Constitution.

The Ninth Circuit's burden-shifting framework for analyzing abrogation under Section 5 of the Fourteenth Amendment for statutes purportedly enacted to remedy sex discrimination was also erroneous. That framework is not only inconsistent with the analysis employed by this Court in *Kimel* v. *Florida Board of Regents* and *Board of Trustees of University of Alabama* v. *Garrett*, which involved statutes enacted to address age and disability discrimination. It is also inconsistent with this Court's decision in *United States* v. *Morrison*, which involved a statute passed to address sex discrimination, and this Court's decisions upholding the Voting Rights Act of 1965, which was passed to address racial discrimination in voting. The Court of Appeals' decision directly impacts nearly one-fifth of the State government employees in the United States, and this Court should not wait to correct the Ninth Circuit's error in this case.

ARGUMENT

In this case, the Court of Appeals for the Ninth Circuit held that the "family leave" provision of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000) ("FMLA"), validly abrogated the States' Eleventh Amendment immunity from suit. Pet. App. at 18a, 20a, 42a. As Petitioners correctly explain, this ruling creates a direct conflict with the decisions of the Fifth Circuit in *Kazmier* v. *Widmann*, 225 F.3d 519, 526 (5th Cir. 2000), and the Sixth Circuit in *Thomson* v. *Ohio State University Hospital*, 238 F.3d 424, 2000 WL 1721038 (6th Cir. 2000) (*per curiam*) (unpublished opinion).[2] Both cases held that Congress did not validly abrogate the States' immunity from suit in enacting the "family leave" provision, 29 U.S.C. § 2612(a)(1)(C).

The Ninth Circuit's ruling also rejects the reasoning of six other circuits that have addressed abrogation of State immunity under the FMLA. *See Laro* v. *New Hampshire*, 259 F.3d 1, 13 (1st Cir. 2001); *Lizzi* v. *Alexander*, 255 F.3d 128, 134–36 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel* v. *Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000); *Chittister* v. *Dep't of Community & Econ. Dev.*, 226 F.3d 223, 228 (3d Cir. 2000); *Sims* v. *Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale* v. *Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett* v. *Univ. of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1219 (11th Cir. 1999), *rev'd in part on other grounds sub nom. Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2000); *see also Schall* v. *Wichita State Univ.*, 269 Kan. 456, 477–81, 7 P.3d 1144, 1160–62 (2000).

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[2] The Sixth Circuit permits citation of its unpublished decisions "[i]f a party believes . . . that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well . . . ." 6th Cir. R. 28(g).

The *amici* States agree with the Petitioners that the Court should grant certiorari to review the decision of the Ninth Circuit. *Amici* endorse the Petitioners' cogent petition for writ of certiorari and would also draw this Court's attention to two significant errors in the Ninth Circuit's opinion: the Ninth Circuit's erroneous analysis of legislative history of the FMLA, and the faulty burden-shifting framework the court used to analyze abrogation under Section 5 of the Fourteenth Amendment.

I. CONGRESS WAS NOT REMEDYING UNCONSTITUTIONAL STATE CONDUCT WITH THE FMLA.

This Court has held that for Congress to invoke its enforcement authority under Section 5, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). The congressional findings that support the FMLA, 29 U.S.C. § 2601(a), include no mention of State conduct or policies that Congress believed were in violation of the Fourteenth Amendment; indeed, State governments are not mentioned in Congress's findings at all. *See id.* As the Fourth Circuit observed in *Lizzi*, "Congress did not identify . . . *any* pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care." 255 F.3d at 135 (emphasis added).

A. Congress Did Not Identify a Pattern of Unconstitutional State Conduct in Enacting the FMLA.

The Ninth Circuit held that Congress had identified a pattern of unconstitutional State conduct by pointing to two documents among the "snippets from legislative

hearings concerning earlier versions of the FMLA," *Sims*, 219 F.3d at 563, submitted by the United States. The first document was a 1990 Bureau of Labor Statistics ("BLS") survey cited in the Senate Report on the FMLA, which "found that 37 percent of surveyed private-sector employees were covered by 'maternity' leave policies, while only 18 percent were covered by 'paternity' leave policies." Pet. App. at 20a (citing S. Rep. No. 103-3, at 14–15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 17). The second document was the transcript of a congressional committee hearing held in 1986 in which a witness testified that a "survey of the private and public sectors done by the Yale Bush Center Infant Care Leave Project revealed that '[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.'" Pet. App. at 20a–21a (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor*, 99th Cong. 33 (1986) (prepared statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project), and citing *id.* at 29–30 (testimony of Meryl Frank)). The Court of Appeals concluded that, when "[t]aken together, the BLS and Yale Bush Center surveys constitute substantial evidence of *unconstitutional* state-sponsored gender discrimination in leave policies for state employees." Pet. App. at 21a (emphasis added).

This conclusion is flawed for several reasons. First, the Court of Appeals assumed that any disparity in the availability of maternity and paternity leave in the public sector was the result of *unconstitutionally* disparate leave policies for men and women. *See id.* The disparity between the availability of maternity and paternity leave, however, was more likely the result of policies meant to account for "actual physical disability on account of

pregnancy, childbirth, or related medical conditions," which this Court upheld under Title VII in *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 290 (1987) (emphasis removed).[3] In *Guerra*, this Court reasoned that the Pregnancy Discrimination Act[4] amendments to Title VII were "not intended to prohibit all employment practices that favor pregnant women," *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 218 n.6 (1991) (White, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in part and concurring in judgment) (citing *Guerra*, 479 U.S. at 284–90), especially where the practice was tied not to stereotypical notions but instead to actual physical disability due to pregnancy or childbirth. *Guerra*, 479 U.S. at 290; *see also Geduldig* v. *Aiello*, 417 U.S. 484, 494–95 (1974) (holding that State disability insurance program that excluded from coverage disability due to normal pregnancy did not violate Equal Protection Clause). The disparity in leave availability could also have been the result of gender-neutral policies that varied from State to State or agency to agency.

Second, the Court of Appeals attributed the disparity to State governments, Pet. App. at 21a ("widespread *intentional* gender discrimination by states"), even though the 1986 testimony related to the entire "public sector." Local governments employ more than twice as many workers as State governments. *See Government Employment March 2000* at 1. Lumping States, which enjoy Eleventh Amendment immunity, together with counties and municipalities, which do not have such immunity, is inappropriate. *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368–69 (2001). Next, the court concluded—without support from the legislative record—that Congress could infer that this information regarding maternity and paternity leave translated into similar gender-based disparities regarding family leave. Pet. App. at 21a. Finally, by relying on it, the court apparently concluded that the information presented to the 99th Congress in 1986 regarding the similarities between patterns of leave availability in the public and private sectors was still valid seven years (and four Congresses) later when the FMLA was passed by the 103rd Congress in 1993.

It is doubtful that such an extended chain of questionable inferences could ever support a conclusion that there was some (unstated) congressional finding that State policies on family leave were unconstitutional. The chain crumbles, however, when confronted with the FMLA's actual legislative history regarding State family and medical leave policies.

B. The Legislative History of the FMLA Demonstrates That Most States Were Ahead of the Federal Government in Addressing Family Leave Issues.

Far from criticizing the States regarding their treatment of family leave issues, Congress expressly recognized that most States had already responded to their employees' leave needs by enacting some form of family or medical leave. In both the House and Senate Reports accompanying the FMLA, Congress included sections detailing progressive State laws on family leave issues:

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[3] *See, e.g.*, Cal. Gov't Code Ann. § 12945(b)(2) (West 1992 & Supp. 2002) (upheld in *Guerra*, requiring four months leave for female employees disabled because of pregnancy or childbirth); Alaska Stat. § 23.10.500(a) (2001) (providing same benefits to employee whose health is affected by pregnancy, childbirth, or related condition as granted to other employees with similar ability to work); Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West 1995 & Supp. 2002) (requiring reasonable leave of absence for disability resulting from pregnancy).

[4] Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

FAMILY LEAVE LAWS IN THE STATES

Since Federal family leave legislation was first introduced, numerous States have begun to consider similar family leave initiatives. Approximately 30 States, the District of Columbia and Puerto Rico have adopted some form of family or medical leave.

California provides up to 16 weeks of leave over 2 years for the birth or adoption of a child, or for the serious health condition of a child, spouse, or parent. It applies to employers with 50 or more workers. California law also requires employers of five or more employees to provide women with a reasonable pregnancy disability leave of up to 4 months. Vermont provides 12 weeks of family and medical leave per year. Employers of 10 or more workers must provide leave to care for a newborn or newly adopted child; employers of 15 or more must also provide leave to care for the serious health condition of a worker's child, spouse, or parent, or for the worker's own serious health condition. The District of Columbia's law provides 16 weeks every 2 years for family leave, and a separate 16 weeks every 2 years for medical leave. Rhode Island's law provides 13 weeks of unpaid family and medical leave for birth, adoption or the serious illness of a family member and the worker's serious health condition. The Rhode Island law covers workers employed by firms of 50 or more. The Wisconsin law requires employers of 50 or more workers and the State government to grant up to 6 weeks of unpaid leave for the birth or adoption of a child, 2 weeks to care for a child, spouse or parent with a serious health condition, and 2 weeks of personal medical leave within a 12 month period. Oregon has enacted a law which

provides for 12 weeks of unpaid parental leave per child for childbirth or adoption for all workers employed by companies with 25 or more employees. Oregon has also enacted a family leave law that provides 12 weeks of leave every 2 years to care for a seriously ill parent or spouse or to care for a sick child for workers employed by companies of 50 or more. The law in Maine requires private employers and local governments having 25 or more employees and the State government to grant up to 8 weeks (over a 2 year period) of unpaid leave for birth, adoption, care of a family member with a serious illness or the employee's own serious illness. North Dakota's law covers State employees and provides 16 weeks of family leave per year for birth, adoption, illness of a spouse, child, or parent. Pennsylvania's law covers State employees and provides 6 months (24 weeks) of parental leave for the birth or adoption of a child. Puerto Rico guarantees 8 weeks paid pregnancy leave at half salary, which can be extended an additional 12 weeks in the event of complications. Puerto Rico's law applies to all employers, and all employees are eligible for coverage. Minnesota has a 6 week parental leave law for birth or adoption covering workers at firms with 21 or more employees.

These States join many others that have enacted laws or regulations protecting employees' right to some form of family or medical leave including Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Tennessee, Washington, and West Virginia.

S. Rep. 103-3, at 20–21, *reprinted in* 1993 U.S.C.C.A.N. at 22–23; *see also* H.R. Rep. 103-8(I), at 32–33 (1993) (similar language).

Many of the laws described in the Senate and House Reports provided greater benefits in some way than the FMLA—e.g., by providing longer leave periods (Pennsylvania), applying to private employers with fewer employees (Maine), or making paid leave available (Puerto Rico). This recitation of facts is more a ringing congressional endorsement of State conduct than an attempt to show a pattern of unconstitutional State behavior that required remedial action under Section 5 of the Fourteenth Amendment.

Moreover, Congress's list of States with "laws or regulations protecting employees' right to some form of family or medical leave" did not purport to be exhaustive, and the "Commission on Family and Medical Leave," which Congress created to study employee leave issues,[5] later found that the States' leave policies in 1993 were actually even a bit better than Congress had realized. According to the Commission, a total of 34 States plus the District of Columbia and Puerto Rico had adopted some form of family or medical leave by early 1993. Comm'n on Fam. & Med. Leave, U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 45 (1996), http://www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/chap3.pdf. Of the 34 States with family or medical leave laws or regulations in 1993, all 34 covered State employees, while 23 "had leave laws covering both private and state employees." *Id.* at 46.

[5] *See* 29 U.S.C. §§ 2631–2633.

For this conclusion, the Commission relied in part on a Department of Labor Women's Bureau publication cataloguing the States' family and medical leave laws as of early 1993, which the Commission characterized as one of the sources of "[t]he most complete information on state laws" regarding family and medical leave prior to the FMLA. *Id.* at 45–46 & nn.33, 34. The Women's Bureau publication suggested, moreover, that even the figure of 34 States was probably understated, because the Women's Bureau study was only "based on State *statutes*." Women's Bureau, U.S. Dep't of Labor, *State Maternity/Family Leave Law* 1 n.1 (1993) (emphasis added) (on file with Law Library of Congress). The study noted that "[s]ome States may provide comparable leave to State and other public employees through personnel codes, policy, practice, executive order, or management directive." *Id.* Thus, by the time Congress enacted the FMLA in 1993, *at least* 34 States, Puerto Rico, and the District of Columbia had already addressed the family or medical leave needs of State employees.

C. Congress Cited the Equal Protection Clause as Justification for Its Own Approach to Leave Issues, Not as the Basis for Remedial Legislation.

Of course, Congress did refer to the Equal Protection Clause of the Fourteenth Amendment in the FMLA. *See* 29 U.S.C. § 2601(b)(4), (5). The question is, however, "What did Congress mean by that reference?" In answering this question, it first bears noting that the reference to equal protection is not found in the statement of congressional "Findings," but in the statement of congressional "Purposes." Congress set forth those purposes in 29 U.S.C. § 2601(b):

It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

. . . .

(4) *to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis*; and

(5) *to promote the goal of equal employment opportunity for women and men, pursuant to such clause.*

29 U.S.C. § 2601(b) (emphasis added).

Here, again, there is no statement—express or implied—that the States had engaged in conduct that violated the Fourteenth Amendment. Instead, Congress was making clear that it intended its *own* approach to family and medical leave to comply with the principle of equal protection and equal employment opportunity. In other words, Congress was clarifying that it had designed the FMLA to avoid the risk of *causing* equal protection violations. Congress did not suggest, however, that the States (or local governments, for that matter) had failed

to uphold their constitutional obligations in addressing family or medical leave issues in the past. *See Sims*, 219 F.3d at 564–65 ("At best, Congress sought to 'minimize[] the *potential* for employment discrimination on the basis of sex.'") (quoting *Florida Prepaid*, 527 U.S. at 641). Thus, the references to the Equal Protection Clause in the FMLA do not support a conclusion that the Act was adopted as remedial enforcement legislation under Section 5 of the Fourteenth Amendment.[6]

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[6] The Senate and House reports confirm that Congress did not view the FMLA as remedying unconstitutional State conduct. In those reports, Congress expressed concern about enacting a leave provision for only one sex or group of employees. Thus, Congress drafted the FMLA so that it would

> address[] the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.
>
> *A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. S. 5, by addressing the needs of all workers, avoids such a risk.*
>
> Thus S. 5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.

S. Rep. 103-3, at 16 (emphasis added), *reprinted in* 1993 U.S.C.C.A.N. at 18; *see also* H.R. Rep. 103-8(I), at 29 (similar language). Thus, Congress was attempting to uphold its *own* obligation to avoid *causing* violations of equal protection or due process while exercising its Commerce Clause powers to address leave issues and impose leave obligations on State actors. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; *Vance* v. *Bradley*, 440 U.S. 93, 94 n.1 (1979) ("[T]he Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."). Congress never accused the States of violating their obligations under the Fourteenth Amendment, however. *See Sims*, 219 F.3d at 564 ("These passages [from the 1993 House Reports] seek to justify the FMLA's provision of leave to all covered employees on the basis of the potential for gender-related discrimination. They do not suggest, however, that Congress

II. THE COURT OF APPEALS EMPLOYED AN ERRONEOUS BURDEN-SHIFTING ANALYSIS FOR SECTION 5 ENFORCEMENT LEGISLATION.

Under this Court's Section 5 jurisprudence, "[t]he first step" in the analysis "is to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Next, having "determined the metes and bounds of the constitutional right in question," the Court "examine[s] whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States . . . ." *Id.* at 368; *Kimel*, 528 U.S. at 89. Finally, the Court determines whether the remedy or remedies chosen by Congress are congruent and proportional to the constitutional injury it identified. *Garrett*, 531 U.S. at 372; *see City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

The Ninth Circuit reasoned that the heightened scrutiny applicable to sex discrimination claims[7] distinguished this case from *Kimel* and *Garrett*, which involved classifications based on age and disability subject to rational-basis scrutiny. Pet. App. at 14a, 17a. When a gender-based classification is challenged, the burden of satisfying the standard of intermediate scrutiny rests with the State. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). With rational-basis scrutiny, the burden rests on the party challenging the classification "to negative

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was responding to a pattern of actual discrimination on the part of the States.").

[7] *See Nguyen* v. *INS*, 533 U.S. 33 (2001); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

'"any reasonably conceivable state of facts that could provide a rational basis for the classification."'" *Garrett*, 531 U.S. at 367 (quoting *Heller* v. *Doe*, 509 U.S. 312, 320 (1993), in turn quoting *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The Court of Appeals observed that the burden of proof placed on the State under intermediate scrutiny "has the effect of creating a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination." Pet. App. at 14a.

The Court of Appeals contrasted its "presumption of unconstitutionality" for sex-based classifications with classifications based on age and disability such as those at issue in *Kimel* and *Garrett*. "In effect," the court reasoned, in those cases "the relevant provisions of the ADA and the ADEA were subject to a *presumption of unconstitutionality*—the burden was on the defenders of the legislation to prove that it was valid under section 5." Pet. App. at 17a. The Court of Appeals stated that, "[w]hile the creation of such a presumption might appear extraordinary and incongruous, it makes sense in light of the Court's emphasis on the fact that state-sponsored age and disability discrimination is *not* subject to heightened scrutiny. The presumption of unconstitutionality applied to the ADA and the ADEA thus is merely the flip side of the presumption of constitutionality that is accorded to state-sponsored age and disability discrimination." *Id.* Pet. App. at 17a. The Court of Appeals then concluded that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. That is, the burden is on the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct." Pet. App. at 18a (footnote omitted).

The Ninth Circuit's shifting presumptions for Section 5 analysis are inconsistent with this Court's precedent.

First, the "presumption of unconstitutionality" that the Ninth Circuit claims was applied in *Kimel* and in *Garrett* does indeed "appear extraordinary and incongruous"—but principally because there is no such presumption, and this Court did not employ such a presumption in either case. Rather, as the Court stated in *United States* v. *Morrison*, congressional enactments enjoy a "presumption of constitutionality" and will be invalidated "only upon a plain showing that Congress has exceeded its constitutional bounds." 529 U.S. 598, 607 (2000); *see also United States* v. *Harris*, 106 U.S. 629, 635 (1883). The opinions of this Court in both *Kimel* and *Garrett* show that Congress failed to identify a pattern of unconstitutional conduct by the States with respect to age or disability discrimination, and that Congress's remedies were disproportionate. *Garrett*, 531 U.S. at 368, 372; *Kimel*, 528 U.S. at 89, 86. Neither act was presumed unconstitutional; they were both *proven* unconstitutional.

Second, requiring "the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct," improperly allows a court to *presume* unconstitutional conduct and then forces the challenger to attempt the always difficult task of proving a negative. *See, e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 218 ("[I]t is never easy to prove a negative."). The Court of Appeals justified this remarkable burden because the FMLA was intended to address sex discrimination, which receives intermediate scrutiny. As Petitioners explain, however, Pet. at 18–19, this Court analyzed Section 5 enforcement legislation addressing sex discrimination in *Morrison*, and imposed no such burden of proving a negative, instead looking to the legislative record to see what Congress had actually found. *See* 529 U.S. at 626 (noting "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States").

The Court similarly did not presume unconstitutional behavior in analyzing the Voting Rights Act of 1965, but instead looked to the substantial record Congress assembled of unconstitutional State discrimination in the context of voting rights. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 310–15 (1966). When Congress later failed to assemble a record of unconstitutional State conduct in support of lowering the voting age to 18 in State and local elections in the Voting Rights Act of 1970, this Court held that Congress had exceeded its authority under Section 5. *See Oregon* v. *Mitchell*, 400 U.S. 112, 130 (1970) (opinion of Black, J.); *id.* at 212–13 (Harlan, J., concurring in part and dissenting in part); *id.* at 293–94 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part); *see also City of Boerne*, 521 U.S. at 530–31 (examining legislative record in case involving Free Exercise Clause of First Amendment).

Finally, the Court of Appeals' review of historical sex discrimination, Pet. App. at 23a–42a, raised its inquiry to a level of abstraction that rendered it ineffective as an analytical tool. It allowed the court to presume current unconstitutional behavior based on past (and in many instances, long past) behavior. It also permitted the court to cite past stereotypes generally to justify specific new requirements under Section 5 that substantively rewrite the underlying constitutional guarantee. *Cf. City of Boerne*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."). Although history may provide a basic framework threshold for further analysis of State conduct, history *alone* is not sufficient to demonstrate a *current* pattern of unconstitutional behavior. The Ninth Circuit's approach mistakenly directs attention away from more recent and

current State conduct, leading to other errors, such as ignoring the 34 States that had already enacted family or medical leave laws for their employees by the time Congress enacted the FMLA. *See* § I(B), *supra*.

The Court of Appeals' substantial departures from "the[] now familiar principles" for analyzing congressional abrogation under Section 5 led it to conclude that the FMLA's family leave provision, 29 U.S.C. § 2612(a)(1)(C), was appropriate Section 5 enforcement legislation. Under this Court's precedents, the family leave provision was neither congruent nor proportional to any constitutional injury identified by Congress. Thus, it was not appropriate Section 5 legislation.

III. THIS COURT SHOULD NOT WAIT TO RESOLVE THE CURRENT SPLIT IN THE CIRCUITS.

Given the importance of the issue presented and the number of States and persons directly affected by the decision of the Court of Appeals in this case, this Court should not wait to address the current split in the circuits. The nine States in the Ninth Circuit have more than 907,000 State employees.[8] Thus, the Court of Appeals' decision affects nearly one-fifth of the Nation's 4.8 million State employees.

Delay in addressing this issue is also unwarranted to allow other circuits to address the issue first. As Petitioners show, this Court has not hesitated to reverse

[8] *See Government Employment March 2000* at 3 (Alaska), 4 (Ariz.), 6 (Cal.), 13 (Haw.), 14 (Idaho), 28 (Mont.), 30 (Nev.), 39 (Or.), 49 (Wash.). Of this figure, over 617,000 are full-time employees, and over 289,000 are part-time employees. *See id.* A part-time employee working at least 25 hours per week, 50 weeks per year could be covered under the FMLA. *See* 29 U.S.C. § 2611(2)(A).

summarily such clearly erroneous applications of the law as in this case. Pet. at 23. Moreover, the result in most other circuits is largely a foregone conclusion. The Fifth and Sixth Circuits have already directly addressed the family leave provision, 29 U.S.C. § 2612(a)(1)(C). The decisions of the Fourth Circuit in *Lizzi* and the Eighth Circuit in *Townsel* do not confine their reasoning to a particular subsection of the FMLA, and those courts are likely to regard the Ninth Circuit's approach as foreclosed by *Lizzi* and *Townsel*, much as the Sixth Circuit did in following *Sims* when confronted with the family leave provision in *Thomson*. This important issue merits immediate attention.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Court of Appeals reversed.

Respectfully submitted,

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